they ought not to be suffered to be infringed on mere considerations of expediency. But it is only the ambiguity of the terms "right" and "public policy" that makes it possible to think of the acts in question in this way. The Fourteenth Amendment does not establish any defined legal rights. Rather it imposes a standard upon legislation — that it shall not be arbitrary and that it shall have a basis in reason. The "rights" of which Mr. Justice McKenna is speaking are not legal rights, but are individual interests which we feel ought to be secured by law, through legal rights or otherwise. Likewise the "public policy" of which he speaks is a mode of referring to social interests which the law ought to or does secure in delimiting individual interests and establishing legal rights. Often in a conflict of individual interests the law turns to "public policy" in this sense to determine the limits of a proper compromise. When the common law in a conflict between the individual interest of the landowner and that of the traveler on the impassable highway resorted to a "policy" expressing a social interest and established a "right of deviation," when in a conflict between the individual interest of the person defamed in his reputation and that of the defamer in speaking freely it resorted to another policy expressing another social interest and established privileged occasions, when as between the individual interest of the owner of land to enjoy it uninjured and that of the owner of a cow which has been let out of the pasture by a wrongdoer without his knowledge or consent,[9] it imposed a liability without fault to maintain the social interest in the general security — in all such cases the common law "subjects rights" to "public policy" exactly as the statutes do of which the minority of the court complain. Our legal terminology has blinded us to these compromises, which make up the whole body of the common law. The same terminology leads us to think of like compromises taking account of new interests, when made by the legislature, as startling and revolutionary.

MUST WE RECOGNIZE A NEW PRIVILEGE IN THE LAW OF EVIDENCE? — It is axiomatic in our law that the public has a right to every man's evidence.[1] To this principle the law of privileged communications forms an important exception. There is to-day no privilege for confidential communications, merely as such.[2] But communications made in the course of a few specific relationships have been recognized as privileged from disclosure. In each the law accords the privilege purely on grounds of policy, because it considers that greater social mischief would probably result from requiring the disclosure of such communications than from

[9] Noyes *v.* Colby, *supra*.

[1] See 4 WIGMORE ON EVIDENCE, quoting Lord Hardwicke, § 2192.

[2] Dean Wigmore tells us that in early English trials the obligation of honor among gentlemen, in regard to matters revealed to them in confidence, seems to have been recognized as an excuse for maintaining silence. See 4 WIGMORE ON EVIDENCE, § 2286. But a sterner view of the necessities of justice prevailed. "It is not befitting the dignity of this High Court," wrote Lord Campden in 1776, "to be debating the etiquette of honor at the same time when we are trying lives and liberties." Duchess of Kingston's Case, 20 How. St. Tr. 586. See also 1 GREENLEAF ON EVIDENCE, 16 ed., § 248.

refusing to insist upon it.[3] To outweigh the undeniable social mischief of impeded justice, some relation, which it is imperative that the law should foster, and to the existence of which a privilege of silence is essential, must stand endangered.[4] Obviously the number of such relationships is strictly limited.

The case of *Lindsey* v. *People* [5] suggests the inquiry: should common-law reasoning extend to an hitherto unknown relationship, that of juvenile-court judge and child delinquent, this privilege of silence? The facts were these: A twelve-year-old boy confessed in strict confidence his part in the murder of his father to the juvenile-court judge of his district. Thereupon delinquency proceedings were instituted against him. At the trial of the boy's mother for the murder, he testified in her favor. To impeach this testimony the judge was asked to divulge the boy's confession, and was adjudged in contempt and fined on refusing to do so upon order of court. From that judgment he appealed. It appears that the boy consented to the judge's testifying. The Supreme Court of Colorado, three judges dissenting, held the confession not to have been a privileged communication; and the adjudgment in contempt was affirmed.[6]

There seems to be afloat in our law a somewhat ill-defined doctrine that judges, as such, have a testimonial privilege.[7] Whether this is law may be questioned.[8] Some jurisdictions deny it *in toto*.[9] Many merely allude to it *obiter*.[10] At most, on the authorities, it probably nowhere extends beyond according to judges of courts of record a privilege not to be compelled to state what had occurred in court in a case there on trial before them.[11] Moreover, this doctrine is one of personal privilege rather than of privilege based upon a relationship, and rests at best upon principles of very limited application.[12] From both points

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[3] See 1 GREENLEAF ON EVIDENCE, 16 ed., § 236.

[4] For Dean Wigmore's analysis of the four elements which must be present if the test of social expediency is to be satisfied, see 4 WIGMORE ON EVIDENCE, § 2285.

[5] 181 Pac. 531 (1919). See RECENT CASES, p. 116.

[6] Whether or not the decision should be supported in view of the Colorado Statute as to privileged communications, is beyond the scope of the present inquiry. The act provides: "Fifth, a public officer shall not be examined as to communications made to him in official confidence, when the public interest, in the judgement of the court, would suffer by the disclosure." See REV. STAT. OF COLO. 1908, § 7274, paragraph 5.

[7] Declaration of Grievances, 1 COBBETT'S PARL. HIST. 1206; Regina *v.* Gazzard, 8 C. & P. 595 (1838); People *v.* Pratt, 133 Mich. 125, 131, 94 N. W. 752, 754 (1903); Hale *v.* Wyatt, 98 Atl. (N. H.) 379 (1916).

[8] "If such privilege exist it has been honored by breach rather than observance." Parsons, C. J., in White Mt. Freezer Co. *v.* Murphy, 101 Atl. (N. H.) 357, 360 (1917).

[9] Lindsey *v.* People, 181 Pac. (Colo.) 531, 536 (1919).

[10] Welcome *v.* Batchelder, 23 Me. 85 (1843); People *v.* Pratt, 133 Mich. 125, 137, 94 N. W. 752, 757 (1903); White Mt. Freezer Co. *v.* Murphy, 101 Atl. (N. H.) 357, 360 (1917); Hale *v.* Wyatt, 98 Atl. (N. H.) 379 (1916).

[11] Knowles' Trial, 12 How. St. Tr. 1179 ff. (1697); Regina *v.* Gazzard, 8 C. & P. 595 (1838); Regina *v.* Harvey, 8 Cox Cr. 99, 103 (1858). See 1 GREENLEAF ON EVIDENCE, 16 ed., § 254 c; 4 WIGMORE ON EVIDENCE, § 2372 (3).

[12] Dean Wigmore would seem to suggest that judges of superior courts are exempted from attendance in court on the same theory of personal privilege which relieves the chief executive from the duty of appearing as a witness. See 4 WIGMORE ON EVIDENCE, § 2372 (3). The language of the cases, however, appears rather to reflect a feeling that it is improper to expose a judge to criticism of his judgment by compelling him to testify as to facts which were presented to him in court and upon which he presumably

of view, then, it is of little help in solving the problem before the Colorado court.[13]

But is there not a new social relationship involved which calls for a true relational privilege? It is submitted that there is. Three analogies suggest themselves. The privilege of husband and wife is accorded because that relationship, the family, is perhaps more jealously safeguarded than any other in our law, and is one to which complete confidence is a *sine qua non*.[14] The privilege of attorney and client rests upon the needs of the law itself. In a system as technical and intricate as the common law the legal profession is essential, not only for actual litigation, but for the orderly conduct of everyday affairs; and only the most complete frankness, impossible but for insured secrecy, makes the work of the lawyer possible.[15] The privilege of informer and public official has a similar basis in social expediency. The administration of criminal justice would suffer immeasurably were freedom from disclosure not accorded informers.[16] Consider the privilege now contended for. The jurisdiction of the juvenile court is not criminal, it is that of the English Court of Chancery, enlarged.[17] The discretionary powers of the judge are enormous. The relation sought to be created is one of guardianship, with a view to uplifting and benefiting the child by state help in those instances where parental direction has proved inadequate or vicious.[18] It is the social background behind the delinquent child that the juvenile-court judge primarily seeks to reach.[19] It seems clear that the relation is one in which trust and confidence on the part of the child, complete freedom from fear of disclosure, are prerequisites to any hope of success.[20] Further, no legal reform of to-day promises greater social benefits for the future. The relationship should be, and is, of vital interest to the law itself. In that essential it is similar to those relationships already considered, for the protection of which the law has accorded a privilege of silence; in that essential it differs from such relationships as penitent and priest, to the maintenance of which secrecy is also of the highest importance, but from which the law has withheld the privilege because they do not fall sufficiently within the scope of the law's utilitarian aims and aspirations.[21]

based his decision. Under either view, no principle applicable to the principal case seems involved.

[13] A feeling that the privilege contended for was allied to that of a judge in regard to a case on trial before him appears to be what led the majority of the court to emphasize their denial that "instantaneous jurisdiction" over the boy could have been acquired by his mere confession. Though jurisdiction in the technical sense may not have been acquired, nevertheless a guardianship relation, worthy of protection, may have thereby in fact come into existence. As to which see *post*.

[14] See 4 WIGMORE ON EVIDENCE, § 2336, and cases there quoted.

[15] See *idem*, § 2291, and cases there quoted.

[16] Worthington *v.* Scribner, 109 Mass. 487; Home *v.* Bentinck, 2 B. & B. 130 (1820); Beatstone *v.* Skene, 5 H. & N. 838 (1860). See 4 WIGMORE ON EVIDENCE, § 2374; also cases collected in § 2374, note 1, and § 2375, note 1.

[17] LAWS OF COLORADO, 1908, chap. 158; Lindsey *v.* People, 181 Pac. 531, 537 (1919). See FLEXNER AND BALDWIN, JUVENILE COURTS AND PROBATION, p. 7.

[18] *Cf.* State *v.* Scholl, 167 Wis. 504, 508, 167 N. W. 830, 831 (1918); Lindsay *v.* Lindsay, 257 Ill. 328, 100 N. E. 892 (1913).

[19] See JUVENILE COURTS AND PROBATION, *supra*, p. 5.

[20] For a full description of juvenile court procedure, see *idem*, Parts I and II. For a collection of juvenile court statutes, see H. H. HART, JUVENILE COURT LAWS OF THE UNITED STATES.

[21] See 4 WIGMORE ON EVIDENCE, § 2394, and cases cited in note 4. In White Mt.

If it be admitted that common-law reasoning requires that a privilege be predicated on the new judge, child delinquent relationship, should this privilege include such a confession as that in *Lindsey* v. *People?* It would seem, with all deference to the *dictum* in that case, that it should. True, formal delinquency proceedings had not as yet been instituted, but it seems clear that the boy voluntarily appealed to the judge in the latter's official capacity. His purpose was to invoke the jurisdiction of the court; and he was thereupon taken in charge as a delinquent child. The relationship to be protected existed in fact; and the privilege should have attached. In the case of attorney and client,[22] and probably in that of physician and patient when privileged by statute,[23] the courts go even further. It would seem the accepted view, in order fully to achieve the purpose of the privilege, that preliminary communications made as overtures, before the professional relation has actually been consummated, are protected.[24]

A single inquiry, but one of extreme delicacy, remains. Assuming that the privilege existed, whose was it? More specifically, who might assert it, and who waive it? The first point is of academic interest only, since on the facts the boy had waived the privilege, provided it was his to waive.[25] But was it? It is submitted with hesitancy that it was not. It would seem, it is true, that normally the person for whose protection the privilege is accorded should have exclusive power to waive it. Such is the law in the case of lawyer and client;[26] of physician and patient.[27] In that of informers, however, the privilege is conceded to be waivable by, and only by, the public official, the recipient of the information.[28] The distinction, like the privilege itself, is based on practical expediency. Informers are not to be trusted as sole arbiters of their own privilege. Though for a very different reason, are not twelve-year-old children, for whose protection and care the whole juvenile-court system is planned, less fitted to be repositories of the power to waive the protecting privilege than is the juvenile-court judge? It is the very essence of that system to impose upon him a guardianship over them. Is he not better qualified than they to judge of the necessity for disclosure that may arise because of an impending perversion of justice if the disclosure be not made? And

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Freezer Co. *v.* Murphy, 101 Atl. (N. H.) 357 (1917), the court refused to recognize as privileged communications made to a labor commissioner during a trade dispute. The ground, however, was largely that secrecy was not essential to the relationship.

[22] People *v.* Pratt, 133 Mich. 125, 94 N. W. 752 (1903); Peek *v.* Boone, 90 Ga. 767, 17 S. E. 66 (1892); Crisler *v.* Garland, 11 Sm. & M. (Miss.) 136 (1848); Cross *v.* Riggins, 50 Mo. 335 (1872). *Contra*, Theisen *v.* Dayton, 82 Iowa, 74, 47 N. W. 891 (1891); Heaton *v.* Findlay, 12 Pa. St. 304 (1849). See 4 WIGMORE ON EVIDENCE, § 2304.

[23] See 4 WIGMORE ON EVIDENCE, § 2382.

[24] Moreover, it should be noted that the statute creating the Juvenile Court aims to secure informal procedure. To attempt to delimit the relationship by lines based on legal forms rather than on *de facto* existence would seem at variance with the spirit of the institution to be protected. See REVISED STAT. OF COLORADO, 1908, §§ 586, 1590, 1607; LAWS OF COLO. (1909) chap. 199; and LAWS OF COLO. (1913) chap. 51.

[25] If there has been no waiver, it is submitted that though the party whose privilege it is be absent, the other party to the relationship should be entitled to assert the privilege in the owner's behalf.

[26] See WIGMORE ON EVIDENCE, § 2321.

[27] See *idem*, § 2386.

[28] Worthington *v.* Scribner, 109 Mass. 487 (1872), and cases collected therein.

surely it cannot be maintained that serious danger would result from intrusting this additional exercise of discretion to a man already occupying a post of such enormous trust.

INJUNCTIONS TO RESTRAIN FOREIGN PROCEEDINGS. — It is clear that a court of equity has jurisdiction to restrain a party from proceeding further with a foreign suit, since the decree operates on the person of the defendant and is not directed against the foreign court itself.[1] But while there is no direct interference with the functioning of the other tribunal, still considerations of interstate harmony and of proper respect due to another court competent to adjudicate the controversy, make the exercise of this jurisdiction a very delicate matter. Formerly, with the English and some American courts, these considerations controlled, and they refrained scrupulously from entertaining such jurisdiction in all cases.[2] Since then, courts have not hesitated to make free use of their power to enjoin, deeming it no violation of the principles of comity to interfere in cases, where to do otherwise would lead to grossly inequitable results. Instances are numerous, however, where interposition was a clear abuse of discretion, and where the foreign court, left unhampered, could have reached, in the end, a more desirable conclusion.

Practically all courts are agreed to-day that a multiplicity of suits, if vexatious, — and such is true in most instances — presents a fair case for the exercise of the Chancellor's discretion.[3] Consequently the defendant is required either to elect the forum most advantageous to his cause,[4] or to pursue his remedy only in the jurisdiction where he first instituted proceedings.[5] No one, it seems, can quarrel with the results in these cases; the defendant's conduct is clearly inequitable in putting the complainant to the expense and annoyance of defending several suits, and restricting him to a single action assures him sufficiently of the justice he seeks. The case is not so clear, however, where the action abroad is the only one pending, and this the complainant claims is vexatious. Mere additional expense and trouble in defending the suit should not warrant interference, since a party is not constrained to sue where it is most convenient for his opponent. He is entitled to any procedural advantage he can secure, and the court should not deny him the privilege unless he exercises it in a manner so unconscientious as to outweigh all other considerations. In the much-discussed case of *Kempson* v. *Kempson*,[6] the

[1] Portarlington *v.* Soulby, 3 Myl. & K. 104 (1834); Dehon *v.* Foster, 4 Allen (Mass.), 545 (1861); Cole *v.* Cunningham, 133 U. S. 107 (1889). In the last case it was held that an injunction of a foreign proceeding does not violate any provisions of the Federal Constitution.

[2] See Lowe *v.* Baker, 2 Freem. 125 (1677); Mead *v.* Merritt, 2 Paige (N. Y.), 402 (1831); Harris *v.* Pullman, 84 Ill. 20 (1876).

[3] See AMES, CASES ON EQUITY JURISDICTION, 28, note.

[4] White *v.* Caxton Bookbinding Co., 10 Civ. Pro. (N. Y.) 146 (1886).

[5] Monumental Saving Assoc. *v.* Fentress, 125 Fed. 812 (1903); Old Dominion Copper, etc. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193 (1909); Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238 (1874). See also 26 HARV. L. REV. 347.

[6] 58 N. J. Eq. 94, 43 Atl. 97 (1899), where the husband of the complainant brought a suit for divorce in North Dakota, invoking the jurisdiction of the court by a fraudulent allegation of his residence in that state. See 15 HARV. L. REV. 145.